Where such right exists, I do not think it is necessary for express words in the section to create obligation on the part of the employer to satisfy the legal right. Any other interpretation would render the section meaningless. In the alternative, there is no prohibition in section 60G or any other provisions in the Employment Ordinance for such payments to be made by an employer. Indeed, it is conceded by counsel for the company that in a claim for retrenchment benefit the company can either reject the claim outright or entertain it. From the pleadings before the Industrial Court, the company's refusal to meet the union's claim was not based on any absence of legal obligation on its part to make the payments, but solely on the ground that it was not in a financial position to do so. That being the case, I am of the view that the company should not now be heard to complain that the Industrial Court was acting in excess of jurisdiction in awarding the retrenchment benefits on the interpretation of section 60G. It is submitted that express words would be necessary if they were intended that the Industrial Court should have power to vary the application of any statutory provision, and that the general terms of section 26 and section 27(5) and (6) of the Industrial Relations Act No. 35 of 1967 do not suffice for this, and that the Industrial Court cannot override the provisions of statutory law. (Authorities cited are at pages 169 and 170 Industrial Disputes Law in Malaysia by *C. P. Mills*). But, in the present case, I do not think that the Industrial Court by making the award has overridden any provisions of statutory law. The Industrial Court is not prohibited by section 60G of the Employment Ordinance from settling disputes regarding retrenchment benefit, especially in the present case where on the pleadings the question of jurisdiction of the court to adjudicate had never been challenged until after the award was made. As stated in the preamble to the Industrial Relations Act 1967, the Act is to provide for the regulation of the relations between employers and workmen and their trade unions and the prevention and settlement of any differences or disputes arising from their relationship and generally to deal with trade disputes and matters arising therefrom. Under section 27(5), the court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form; and under sub-section (6), in making the award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute. Thus, subject only to the qualification that it cannot override the provisions of statutory law, the Industrial Court has power in relation to a trade dispute referred to it by the Minister to make an award relating to all or any of the issues in dispute. In the instant case, the dispute is in respect of retrenchment benefits, and as stated earlier on, there is no statutory law which prohibits the Industrial Court from making an award on retrenchment benefits. The so-called restriction imposed by section 60G of the Employment Ordinance is in fact non-existent. The section merely prohibits the court from making such an award to labourers who have not been in continuous service with an employer for less than three years. To my mind, the Industrial Court is entitled to make an award for the settlement of any differences or disputes arising from the relationship between an employer and workmen and their trade unions, even if there is no express obligation on the part of the employer to make the payment as awarded, subject only to the qualification that such award is not prohibited by the provision of any statutory law. In the present case, however, I hold that the applicant is in fact under legal obligation to pay the retrenchment benefits as the claimants are entitled to such benefits under section 60G of the Employment Ordinance. As such, the award made is not wrong in law; and that for reasons already stated earlier on, the Industrial Court has not acted in excess of its jurisdiction in ordering that the claimants as per Schedule B of the award be paid retrenchment benefits.

In the event, I dismiss this motion with costs.

*Motion dismissed.*

Solicitors: *Ranjit, Thomas & Kula; Skrine & Co.*

---

## KOK YOONG HEONG v. CHOONG THEAN SANG

**[O.C.J. (Arulanandom J.) November 10, 1975]**
**[Penang — Originating Summons No. 83 of 1975]**

*Family Law — Custody of children — Welfare of children — Civil Law Act, 1956, s. 27 — Guardianship of Infants Act, 1961, ss. 5 and 11.*

The applicant applied for the custody of her two children, aged 3 years and 2 years. The parties had been divorced and the children had been allowed to be in the custody of the respondent, their father, as he had stated to the applicant he was ill and did not have long to live and wanted to be with the children.

**Held:** considering all the circumstances of the case, it would be in the best interests of the welfare of the children for them to be in the custody of their mother the applicant, the father being given reasonable access to them.

*Cases referred to:-*

(1) *Re Satpal Singh, an infant* [1958] M.L.J. 283.
(2) *Helen Ho Quee Neo* v. *Lim Pui Heng* [1974] 2 M.L.J. 51.
(3) *Yong May Inn* v. *Sia Kuan Seng* [1971] 1 M.L.J. 280.

ORIGINATING SUMMONS.

*Geh Cheng Lok* for the applicant.

*Goh Lim Eam* for the respondent.

**Arulanandom J.:** In this case the applicant applied to court for an order that she be given the custody of two children *viz.* Choong Fook Choy and Choong Fook Keong born to her on June 21, 1972 and October 10, 1973 of her marriage to the respondent Choong Thean Sang on November 30, 1971.

Both the applicant and respondent are school teachers earning about the same salary. Diverse differences having arisen between the parties they separated about November 1974 and since then the two children are in the custody of the respondent who lives with his mother and sisters. Some time prior to the final breakdown of the marriage there was an incident in the family house when, while both parties

claim the other was at fault it ended with the respondent assaulting the applicant and the applicant subsequently lodging a medical report and seeking medical attention. Subsequent to this an attempt was made at reconciliation but this did not resolve any of their domestic problems. On the contrary the relationship deteriorated until November 1974 when the respondent went with the children to live with his mother and sisters in Penang while the applicant stayed by herself in Sungei Patani and continued to work there.

It is customary in cases where marriages break down for the parties to make various allegations against each other, complaints which if the bond of affection had remained would have passed unnoticed but because of strained relations assume gigantic proportions. The applicant's main grounds of complaint were that the respondent was a man of violent temper, given to physical assaults, niggardly in providing for household expenses, more attached to his mother and sisters than herself and not prepared to make a go at building up a family life with her and her children. The respondent's complaint was that the applicant was a spend-thrift, disliked household chores or responsibilities, did not care for the children and could not get along with servants.

In the voluminous affidavits filed by the parties various instances of petty peccadilloes were enumerated but for the purposes of this case there is no need to deal with them in detail. If one could probe into the lives of many happy families one could find examples galore of such trivia but in happy homes the strength of the bond of attachment vaporises any trace of acrimony. Suffice it to say that nothing in the conduct or character of the parties is of such a nature as to deprive them of their parental rights over the children.

One serious point in dispute is the manner in which the two children came into the custody of the respondent. The respondent's case is that the applicant voluntarily gave them to his custody as she was not sufficiently interested in them. The applicant's case is that the respondent inveigled her into parting with the children by making her believe he was suffering from some terminable ailment and he did not have long to live and that for the short time he had left his only wish was to be allowed to be with the children and look after them. On perusing some of the letters which the respondent sent to the applicant *viz.* P1A, P1B, P1C and P10, the court is inclined to accept the applicant's version of why she allowed the children to go with the respondent. Another factor which has some bearing on the matter is that in one letter, various terms were spelt out for the respondent to comply with if the children went with him which in the opinion of the court could not have happened if the applicant was not interested in the children and was giving them away to the respondent.

The law relating to Guardianship of Infants is regulated by the Guardianship of Infants Act, No. 13 of 1961. Section 5 of that Act reads as follows:—

"5. Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:

Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent."

Section 11 of the same Act goes on further to say that the court of a judge in exercising the powers conferred by the foregoing provisions shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. Further, section 27 of the Civil Law Act No. 67 reads as follows:

"27. In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law."

That the paramount consideration shall be the welfare of the child is well-settled law and the courts have gone further to state that when considering the 'welfare' referred to the section 11 which refers to guardianship of infants, the court must take the word in its large signification and as meaning that the welfare of the child as a whole must be considered. It is not merely a question of whether the child will be happier in one place than in another but it concerns the general well-being. The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years. See *Satpal Singh, an infant.*[1] Further, in the case of *Helen Ho Quee Neo* v. *Lim Pui Heng,*[2] the Court of Appeal Singapore held that all relevant factors have to be considered including the conduct of the parties and their characters, bearing in mind that the welfare of the child is the first and paramount consideration. No hard and fast rules can be laid down based on the sex of the parent or the child as to who should have its care and control and/or custody. In the same case a difference was also made between 'custody' and care and control of the child and the Court of Appeal held that 'care and control' was only a constituent element of custody and not synonymous of it.

In the submissions before the court it was argued by counsel for the respondent that the applicant showed no interest in the second child and was not interested in access to the second child. The applicant denies it and says the only reason why she referred to the first child in her letters was because only the first child was of such an age as to appreciate the affection given to it through the respondent while the second child was too young to be appreciative of words of love to it. The applicant also stated that the respondent in arranging for the applicant to visit the elder child at a third party's home told her that he could not possibly bring both the children together as the younger one was too small. In the circumstances of the case the court was inclined to accept the applicant's explanation. It was also stated in court that the reason why the respondent stopped bringing the elder child for the applicant to visit was because the child had nightmares after each visit and called for the mother. In this case financially both the applicant and the respondent are in the same position as far as their ability to look after the children was concerned. Furthermore the court is satisfied that both are equally fond of the children and sincerely want care and custody of the children for themselves

but because of the bitterness and acrimony which exists between them the question of joint custody could not be considered in the interests of the children. The children are now living with the respondent and his mother and sisters. The respondent himself in his letters to the applicant has stated that he was suffering from some sort of illness which may be terminable and he may not have a long life. This may or may not be true but whatever the merits it was on this ground that he persuaded the applicant to part with the children. But if it were true it may be that not only could the children not be expected to be brought up in a happier way by those to whom the respondent might feel disposed to entrust their upbringing but they might find themselves in a home where neither of their real parents are present to look after their welfare. In *Helen Ho's case, supra* the Court of Appeal held that the proper order to be made when the question of a child being brought up either by the natural mother or by the parents of the natural father was that child of tender years should have the benefit of being brought up by their own mother. Similarly in the case of *Yong May Inn* v. *Sia Kuan Seng*[3] at page 281 the late Sharma J. said in granting custody of three children to their mother.

"They have a right to their mother's love and affection and no one can do what a mother can do for their children."

When the children were brought into chambers they looked well-clothed, healthy and well-fed. So I have no criticism for the manner in which the respondent had been looking after them. The younger child was too young to express any views of his likes or dislikes and the elder boy was happy to say he wants to live with his mother but he wants to live with his father also. In these cases the court is not bound by the views of minors because of their tender years they are conditioned by people around them. The applicant's genuine consideration for the well-being for her children is also evidenced by her having registered the elder boy for school which he will be attending next year and also by taking an education endowment policy on her life for the secured education of her son. When the children are in the care and custody of the applicant who will keep them in her own home there should be no impediment to the respondent's having access to the children or visiting them. While on the other hand while the children are in the custody of the respondent he keeps them in their mother's home. The strained relation between the applicant and the respondent's family which is not uncommon in cases such as this will not only prevent easy access for the mother to her children but almost make it impossible unless children are brought to homes of third parties which again will not prove satisfactory in the long run. The younger child especially is hardly two years old and is of an age when it needs the mother's care, love and affection, and a mother has a right not to be deprived of a child of tender years whom she has borne in her womb for nine months. Considering all the circumstances it is the view of the court that it would be in the best interests of the welfare of the children for them to be in the custody, care and control of their mother, the applicant. However, the respondent will have access to the children on weekends and would be entitled to have the children to spend when they are school-going two weeks of all school holidays with him.

As regards the question of maintenance the order is that the respondent pay to the applicant the sum of $75 a month as maintenance for the two children until further order of the court. Respondent shall pay the applicant costs of these proceedings. Parties shall be at liberty to apply.

*Order accordingly.*

Solicitors: *Geh Cheng Lok & Co.; Goh Lim Eam & Muttiah.*